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No. 07-155

IN THE
Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *iv* of the Petition, and there are no amendments to that statement.

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INTRODUCTION[1]

The dollar amounts at stake in this case are immense; municipalities overcharged the California power markets in 2000-2001 by a half billion dollars or more, based on the FERC refund calculation methodology. The Court of Appeals's ruling jeopardizes that relief. Even more important than the money that would flow back to California consumers are the principles at stake and their impact on FERC's power to ensure just and reasonable rates in the newly created electricity markets now prevalent across the nation. Regional electric markets operated by public utilities transmit the vast majority of the electric power consumed in the United States today. Municipal power sellers play a significant role in each of those markets.

The Ninth Circuit's conclusion that FERC cannot enforce its orders uniformly within those markets will create lasting inequities and inefficiencies that will extend far beyond just this case. Contrary to Respondents' arguments, the Federal Power Act (FPA) does not permit, much less require, such non-uniform—indeed, discriminatory—treatment.

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[1] The abbreviations and terminology used in the Petition will be used in this brief. The Petition will be cited as "Pet." The brief filed by various municipalities, "Brief of the Governmental Respondents in Opposition," will be cited as "Muni." and the Federal Government's brief, "Brief of the Federal Respondents in Opposition," will be cited as "Fed."

ARGUMENT

I. THIS CASE PRESENTS ISSUES OF CONTINUING NATIONAL SIGNIFICANCE.

Respondents do not dispute any of the following points. First, the past decade has seen the rise of a "brave new regulatory world," in which centralized energy markets dominate the scene. *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1301 (D.C. Cir. 2007). Fully two-thirds of the electric power consumed in the United States flows through such centralized markets. Pet. 28. Second, some 3,000 municipalities play a major role in these centralized markets. Pet. 29. Municipalities generate about a fifth of the energy consumed in the United States. Pet. 28. Third, the markets cannot operate efficiently or fairly if FERC cannot exercise jurisdiction over *all* the sales and order all participants in the markets to abide by the same rules. Pet. 29. Fourth, Congress never conceived of this brave new world when it crafted the FPA 80 years ago. Pet. 23-25.

Despite all these tacit concessions, Respondents insist the legal issue presented here is "of minimal ongoing importance." Fed. 9. Their main basis for minimizing the importance of this gaping regulatory hole is the Energy Policy Act of 2005 (EPAct). Respondents assert that Congress has resolved the question, for better or worse.

Respondents are mistaken. EPAct does not resolve the statutory question presented here. It addresses a completely different type of refund obligation that is imposed in entirely different circumstances. One applies to situations where FERC *changes* a tariff; the other applies to the very

different situation where FERC *enforces* an existing tariff against entities that *violated* it.

The question presented here is the scope of the Commission's authority to order refunds of the first type, which is governed by Section 206(b) of the FPA, 16 U.S.C. § 824(e)(b). The starting point for such a refund is Section 206(a), which authorizes market participants to file a complaint at FERC if they believe a filed rate is not just and reasonable. If FERC agrees, it has the power to set a new rate—but only prospectively. FPA § 206(a), 16 U.S.C. § 824e(a). Since, however, FERC cannot investigate and fix a new rate instantaneously, Congress created a stopgap to protect consumers from the effects of administrative delay. The stopgap is codified in Section 206(b), which authorizes FERC to order refunds for the period while FERC's regulatory proceeding is under way. FPA § 206(b), 16 U.S.C. § 824e(b).

FERC implements this sort of refund by establishing a "refund effective date" shortly after the filing of the complaint—thereby providing notice that amounts collected thereafter are subject to refund. Once FERC fixes a new tariffed rate, it orders that the rate will be effective all the way back to that refund effective date. *Id.* The refunds currently at issue in this case were all ordered under Section 206(b), arising from transactions that were made after the complaint was filed in the underlying FERC case, but before FERC issued its orders correcting the markets.

EPAct did not modify Section 206(b) in any relevant way when it added a new provision—Section 206(e), 16 U.S.C. § 824e(e) (Supp. V 2005). That provision has nothing at all to do with

circumstances where FERC *amends* a filed tariff and seeks refunds based on the changed rate. Section 206(e) focuses only on the second sort of refund—where FERC finds a *violation* of a tariff. The distinction is plain on the face of Section 206(e)(2), which reads in pertinent part:

> If an entity described in section 201(f) of this title [a municipality] voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) *and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale*, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

16 U.S.C. § 824e(e)(2) (emphasis added).

The distinctions are profound. Whereas Sections 206(a) and (b) address forward-looking changes in rates after a complaint is filed, Section 206(e) is concerned with violations of FERC tariffs or rules that occurred *before* the filing of a complaint. Moreover, relief under Section 206(e) is not limited by the refund effective date (as is relief under Sections 206(a) and (b)), but rather is available for the period that the existing tariff rate was not followed. Finally, Section 206(e) refunds address the impact of violations where the rate charged differed from the rate on file at the time of the sale; in contrast, Section 206(b) addresses the impact of rates that have been changed by the Commission pursuant to Section 206(a) *after* the time of the sale.

In short, Section 206(e) provides no answer to the central question in this case: whether FERC has authority to direct refunds against municipalities pursuant to Section 206(a) and (b). Section 206(e) does not say whether refunds are available against municipalities that participate in centralized clearing house markets whose rates are found to have been unjust. Section 206(e) does not address the extent of refund liability under the procedural and temporal constraints of Section 206(b). Section 206(e), therefore, neither addresses nor fills the regulatory void that the Court of Appeals has created.[2]

Respondents also assert that this case is unimportant—because the "perfect storm" of circumstances that gave rise to the California market disturbance of 2000-2001 [is] not likely to be repeated." Muni. 2-3. There is no way to predict whether a catastrophe will ever arise again; no one expects crises. More to the point, however, the importance of this issue does not depend upon whether unjust rates will ever again reach crisis proportions. This issue is important because

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[2] EPAct did amend Section 206(b), but in a manner that bears no relation to the issue of municipal liability. Before EPAct, Section 206(b) provided that the earliest possible refund effective date would be 60 days after filing of a complaint under Section 206(a). The amendment provides that FERC can set a refund effective date as early as the very day of filing of the complaint. The amendment was designed to expand refunds by erasing the 60-day lag in the old provision. *See Comprehensive National Energy Policy: Hearing on H.R. 6 Before the Subcomm. on Energy and Air Quality*, 108th Cong. 51 (2003) (statement of Comm'r Massey, FERC).

sometimes tariffs yield unjust and unreasonable prices, and when they do, Congress has directed FERC to step in and reset the price. FPA § 206(a), 16 U.S.C. § 824e(a). If the Court of Appeals opinion stands, FERC will have refund authority over only a portion of the market—letting municipalities cheat the system by collecting refunds on purchases while denying refunds on their contemporaneous sales. The issue is important because it impacts markets that now govern two-thirds of the country's wholesale electric power—covering 30 states across this country. Pet. 28. With or without a looming crisis, the issue remains important because the holding undermines the effectiveness of the Section 206(b) refund remedy, a remedy that FERC routinely invokes and that is a central feature of FERC's consumer protection mission.

II. THE COURT OF APPEALS OPINION CONFLICTS IRRECONCILABLY WITH THIS COURT'S PRECEDENTS.

A. FERC'S Interpretation of the Scope of its Refund Authority was Consistent with an Unbroken Line of Precedents on the Authority of Agencies to Regulate the Transactions of Entities that Are Ordinarily Outside their Jurisdiction.

FERC did not hold, and PG&E is not arguing, that municipalities fall within FERC's jurisdiction or "that the jurisdictional limitations . . . may be disregarded." Fed. 11. Nor did FERC, or PG&E, make the absurd argument "that a regulatory agency may disregard a jurisdictional restriction in order to regulate directly a matter over which

Congress has expressly denied the agency regulatory power." Fed. 12.

Rather, the argument is that when a municipality opts to sell its power through a centralized market subject to FERC's jurisdiction, and FERC concludes that the prices paid throughout that centralized market were unjust and unreasonable, FERC can order all the participants in the market to pay refunds. FERC has that power not because it has jurisdiction over the municipalities *per se*, but because it has jurisdiction over all sales within the centralized market operated by a public utility. Exercising that jurisdiction is the only way to ensure that FERC can effectively regulate these markets.

As the Petition details, FERC's holding was consistent with a long line of Supreme Court authority finding jurisdiction in similar circumstances. Pet. 16-22. The litany begins with *Houston East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914). Respondents acknowledge that "this Court upheld the regulatory jurisdiction of the Interstate Commerce Commission . . . over allegedly discriminatory interstate transportation rates, even though the remedy ultimately adopted affected intrastate rates that were beyond the ICC's jurisdiction." Fed. 11. But they insist the case is inapposite because "[t]he ICC did not purport to regulate any *intrastate* rates directly." *Id.*; *see* Muni. 15.

The fact that the ICC did not regulate intrastate rates "directly" is the point of the case. The ICC ordered the railway to equalize interstate and intrastate rates, and that order "relieved [the railway] from further obligation to observe the

intrastate rates." 234 U.S. at 350. Thus, the ICC order had a very real impact on intrastate rates despite the express prohibition on ICC regulation of such rates. This Court upheld the ICC determination, concluding that it would create an unacceptable regulatory void if the agency could not so act. The Court explained, "in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation." *Id.* at 358-59. The same principle applies with full force here. Stripping FERC of the authority to compel compliance by municipalities that sell into centralized markets subject to FERC's jurisdiction gives rise to exactly the regulatory void the Court rejected in *Houston*.

Respondents' efforts to distinguish the other cases discussed in the Petition are equally unavailing. Each of those cases supports FERC's authority to consider and impact non-jurisdictional rates or activities. While none of the cases directly address the activity at issue in this case—*the sales by governmental entities into centralized markets operated by public utilities*—they broadly support the proposition that FERC must have the authority to regulate and require refunds for such sales as part of its statutory duties under the FPA.

Particularly conspicuous is the absence of any reference, in either opposition brief, to *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), which the Petition discussed at length. Pet. 18-20. The case deals with curtailment—that is, limiting volumes to be delivered. As the Petition explains,

in *Louisiana Power,* the Court upheld the Commission's approval of orders that would curtail "direct sales" customers otherwise exempt from NGA jurisdiction. Again, the agency did not set about to curtail or regulate in any way direct sales, but it found that it could not effectively exercise its responsibility with respect to wholesales sales without curtailing direct sales as well.

Respondents have no explanation for why it is appropriate to ignore this Court's admonition in *Louisiana Power* that "Congress 'meant to create a comprehensive and effective regulatory scheme,' of dual state and federal authority," and that Congress intended that there "would be no 'gaps' for private interests to subvert the public welfare." 406 U.S. at 631. Though the Court was speaking of natural gas regulation, the conclusion is just as applicable to electric regulation. Unless the Court grants certiorari in this case, there will be a regulatory gap that Congress did not intend.

Respondents also improperly and incorrectly attack the argument that the jurisdictional provision must be read together with the Commission's authority under Section 309 of the FPA, which authorizes FERC to take any actions "as it may find necessary or appropriate to carry out" its regulatory mission. FPA § 309, 16 U.S.C. § 825h. As an initial matter, the municipalities are incorrect when they assert that this is a "basis the agency did not assert." Muni. 12. FERC did identify and rely on Section 309 in the orders under review. *See, e.g., San Diego Gas & Elec. Co.,* 97 FERC ¶ 61,275 at p. 62,185, n.65 (2001) (explaining FERC's authority to order refunds, with citation to Section 309, in response to arguments

raised by municipalities); *id.* at p. 62,202, n.170 (explaining that Section 309 "gives the Commission the necessary flexibility to take unusual remedial action in appropriate circumstances").

Respondents are also incorrect that the invocation of Section 309 is impermissible under *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974). Muni. 13; Fed. 12 n.6. There, the Court was concerned with the FPC's effort to effectively deregulate small producers. The Court observed that Section 16 of the Natural Gas Act, a section analogous to Section 309, did not "vest authority in the Commission *to set unjust and unreasonable rates.*" 417 U.S. at 394 (emphasis added). Thus, *Texaco* stands for the proposition that FERC did not have authority to override its key statutory charge that rates must be just and reasonable—the situation is the exact opposite of the situation here, where FERC's action was taken to effectuate its statutory charge to ensure just and reasonable rates.

Far more pertinent in the circumstances of this case is *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), which addressed the same NGA provision. There, in response to the Commission's exercise of this "necessary and proper" power, the Court held that "the Commission's broad responsibilities . . . demand a generous construction of its statutory authority." *Id.* at 776.

B. FERC's Interpretation Was Entitled to *Chevron* Deference.

Respondents incorrectly assert that FERC is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), because the statute at issue is unambiguous. Fed. 13-15; Muni. 10-12. Respondents do not suggest for a moment that Congress actually contemplated the possibility that municipalities would participate in centralized markets under FERC's jurisdiction, when it passed the FPA back in 1935. *See* Pet. 23-30. To the contrary, FERC's brief before the Court of Appeals emphasized the 1935 legislative history in which witnesses explained to Congress that municipalities in 1935 simply did not sell power in wholesale markets—a quaint world that is far different from today. Brief of Respondent FERC on Jurisdictional Cases at 21-25, Bonneville Power Administration v. FERC, No. 02-70262, *et al.* (9th Cir. Jan. 31, 2005). Indeed, the D.C. Circuit highlighted the ambiguities presented by modern power markets in *Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000). *See* Pet. 23-24.[3]

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[3] The municipalities incorrectly fault PG&E for making this argument "incredibly, without even citing *Chevron*." Muni. 10. When an argument is about "Supreme Court Precedent Requiring Deference to a Regulatory Agency," Pet. 23, this Court hardly needs a primer on *Chevron*. Moreover, PG&E did invoke *Chevron* in a block quotation to *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366-67 (1994), and set up the controlling principles while discussing *APX*. Pet. 23-24. The centerpiece of that discussion was *Chevron*.

Nor do Respondents explain how the answer to the question here—whether FERC has refund jurisdiction over all sales in a centralized market operated by a public utility—could possibly be unambiguous in light of conflicting Congressional directives applicable to this case: On the one hand to ensure that all rates charged under tariffs of public utilities are just and reasonable; on the other hand to exclude municipalities from FERC's jurisdiction. *See* Pet. 6-7. The plain language of the FPA simply does not answer the question with clarity.

Because the statute is ambiguous, FERC's interpretation must be upheld so long as it is a reasonable construction of the statute. *See Chevron*, 467 U.S. at 843. It most certainly is: FERC's interpretation accorded with the fundamental purpose of the act—the protection of consumers—by ensuring that consumers receive refunds for amounts they were overcharged by *all* the participants in those FERC-regulated markets. Furthermore, FERC's analysis was faithful to both the FPA's overarching directive, to ensure that rates are just and reasonable, and to this Court's precedents interpreting the same language in the FPA and similar statutes.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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